

BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of:

FAWN WHELAHAN,

Respondent.

No. 04-006

STIPULATED FACTS,
CONCLUSIONS AND ORDER

I. STIPULATION

THIS STIPULATION is entered into under WAC 292-100-090(1) between the Respondent, Fawn Whelahan, and Board Staff of the WASHINGTON STATE EXECUTIVE ETHICS BOARD (Board) through BRIAN R. MALARKY, Executive Director. The following stipulated facts, conclusions, and agreed order will be binding upon the parties if fully executed, and if accepted by the Board without modification(s), and will not be binding if rejected by the Board, or if the Respondent does not accept the Board's proposed modification(s), if any, to the stipulation.

Section 1: PROCEDURAL FACTS

1.1. On February 26, 2004, the Executive Ethics Board received a referral from the State Auditor's Office (SAO) alleging that Fawn Whelahan, an employee of the State of Washington, Department of Health (DOH) used her state computer, e-mail and Internet for personal use. The Board reviewed this referral and issued a complaint in May 14, 2004.

1.2. The Board is authorized under RCW 34.05.060 to establish procedures for attempting and executing informal settlement of matters in lieu of more formal proceedings under the Administrative Procedures Act, including adjudicative hearings. The Board has established such procedures under WAC 292-100-090.

1.3. Fawn Whelahan understands that if Board staff proves any or all of the alleged violations at a hearing, the Board may impose sanctions, including a civil penalty under RCW 42.52.480(1)(b) of up to \$5,000, or the greater of three times the economic value of anything received or sought in violation of chapter 42.52 RCW, for each violation found. The Board may also order the payment of costs, including reasonable investigative costs, under RCW 42.52.480(1)(c).

1.4. Fawn Whelahan recognizes that the evidence available to the Board staff is such that the Board may conclude Ms. Whelahan violated the Ethics in Public Service Act. Therefore, in the interest of seeking an informal and expeditious resolution of this matter, the parties agree to entry of the stipulated findings of fact, conclusions of law and agreed order set forth below.

1.5. Fawn Whelahan waives the opportunity for a hearing, contingent upon acceptance of this stipulation by the Board, or her acceptance of any modification(s) proposed by the Board, pursuant to the provisions of WAC 292-100-090(2) which provides in part:

The board has the option of accepting, rejecting, or modifying the proposed stipulation or asking for additional facts to be presented. If the board accepts the stipulation or modifies the stipulation with the agreement of the respondent, the board shall enter an order in conformity with the terms of the stipulation. If the board rejects the stipulation or the respondent does not agree to the board's proposed modifications to the stipulation, the normal process will continue. The proposed stipulation and information obtained during formal settlement discussions shall not be admitted into evidence at a subsequent public hearing.

1.6. If the Board accepts this stipulation, the Board will release and discharge Fawn Whelahan from all further ethics proceedings under chapter 42.52 RCW for matters arising out of the facts contained in the complaint in this matter, subject to payment of the full amount of the civil penalty due and owing, any other costs imposed, and compliance with all other terms and conditions of the agreed order. Ms. Whelahan in turn agrees to release and discharge the Board, its officers, agents and employees from all claims, damages, and causes of action arising out of this complaint and this stipulation and agreed order.

1.7. If this Stipulation is accepted, this Stipulation and Order does not purport to settle any other claims between Fawn Whelahan and the Washington State Executive Ethics Board, the State of Washington, or other third party, which may be filed in the future.

1.8. If this Stipulation is accepted, this Stipulation and Order is enforceable under RCW 34.05.578 and any other applicable statutes or rules.

1.9. If the Board rejects this stipulation, or if Fawn Whelahan does not accept the Board's proposed modification(s), if any, Ms. Whelahan waives any objection to participation at any subsequent hearing by any Board member to whom this stipulation was presented for approval under WAC 292-100-090(2). Further, Ms. Whelahan understands and agrees that this proposed stipulation and information obtained during any formal settlement discussions held between the parties shall not be admitted into evidence at a subsequent public hearing, unless otherwise agreed by the parties.

Section 2: FINDINGS OF FACT

2.1. When the complaint in this matter was filed, and at all times material hereto, the State of Washington, DOH, employed Fawn Whelahan as an Administrative Assistant for the Management Services Division. Ms. Whelahan was a DOH employee from July 2, 1997 until November 2003 when she left to work for another state agency.

2.2. A review of Ms. Whelahan's state computer e-mail between June 11, 2003 and October 27, 2003, revealed that she sent 65 non-work related e-mail messages. Some of these messages were sent to other employees and contained jokes, poems, personal correspondence and links to websites related to automobiles and her cosmetics business website. While reviewing Ms. Whelahan's e-mail, it was noted that her co-workers were also sending non-work related e-mail. Ms. Whelahan's e-mail contained correspondence with other employees that referenced her outside cosmetics business and the selling of products to employees.

2.3. A review of Ms. Whelahan's internet use found that she logged onto non-work-related sites, including her personal e-mail account and a cosmetics company.

2.4. Ms. Whelahan also maintained personal file folders on her computer. These files contained financial and legal correspondence, personal photographs, recipes, poems, astrology and college homework assignments.

2.5. Ms. Whelahan admitted that she gave her computer password and SCAN number to DOH interns.

2.6. DOH Policy/Procedure Number 10.008 states: "...state employees cannot use state computers for personal use unrelated to an official business purpose." This policy further states: "Occasional and limited use of state resources does not include the following private use of state resources: (a) Any use for the purpose of conducting an outside business ..."

2.7. Ms. Whelahan attended Ethics training in October 2003.

Section 3: CONCLUSIONS OF LAW

3.1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over Fawn Whelahan and over the subject matter of this complaint.

3.2. Pursuant to WAC 292-100-090(1), the parties have the authority to resolve this matter under the terms contained herein, subject to Board approval.

3.3. A state officer or employee is prohibited under RCW 42.52.160 from using state property "under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee or another."

3.4. The Ethics in Public Service Act allows for de minimis personal use of state resources. WAC 292-110-010(4) states that employees may make occasional but limited personal use of state resources such as electronic messaging systems and the Internet if the use conforms with ethical standards and the employee's agency has adopted a policy authorizing Internet access consistent with the Board's de minimis rule.

3.5. WAC 292-110-010(6)(a) explicitly prohibits at all times the use of state resources for "the purpose of conducting an outside business or private employment." WAC 292-110-010(6) states:

The state Constitution, state and federal laws, and the Ethics in Public Service Act strictly prohibit certain private activity and certain uses of state resources. Any use of state resources to support such activity clearly undermines public confidence in state government and reflects negatively on state employees generally. This rule explicitly prohibits at all times the following private uses of state resources. (a) Any use for the purpose of conducting an outside business or private employment; (b) Any use for the purpose of supporting, promoting the interests of, or soliciting for an outside organization or group, including, but not limited to: A private business, a nonprofit organization, or a political party (unless provided for by law or authorized by an agency head or designee); (c) Any use for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. . . .

3.6. Based on Findings of Fact 2.1 to 2.7, Ms. Whelahan used state resources in violation of RCW 42.52.160, WAC 292-110-010 and agency policy. Ms. Whelahan's use of her state computer to pursue personal interests and conduct her outside business violated agency policy and exceeded the de minimis standards. Ms. Whelahan further violated the Ethics Act when she gave her SCAN access number to law clerks .

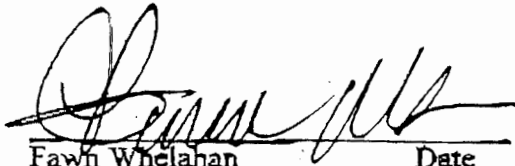
3.7. The Board is authorized to impose sanctions for violations to the Ethics Act pursuant to RCW 42.52.360. The Board has set forth criteria in WAC 292-120-030 for imposing sanctions and consideration of any mitigating or aggravating factors. There are no aggravating or mitigating factors in this case.

Section 4: AGREED ORDER

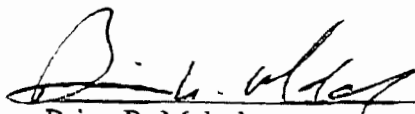
4.1. Fawn Whelahan will pay a civil penalty in the amount of five hundred dollars (\$500.00). The Board agrees to suspend \$250.00 of the civil penalty on the condition that Ms. Whelahan complies with all terms and conditions of this Stipulation and Order and commits no further violations of chapter 42.52 RCW. The civil penalty of \$250.00 is payable to the state

CERTIFICATION

I, Fawn Whelahan, hereby certify that I have read this Stipulation and Agreed Order in its entirety. I knowingly and voluntarily waive my right to a hearing in this matter; and I fully understand and voluntarily agree to this Stipulation.


Fawn Whelahan Date 082704
Respondent

Stipulated to and presented by:


Brian R. Malarky Date 27 Aug 04
Executive Director

II. ORDER

Having reviewed the proposed Stipulation, WE, THE STATE OF WASHINGTON EXECUTIVE ETHICS BOARD, pursuant to WAC 292-100-090, HEREBY ORDER that the Stipulation is

_____ ACCEPTED in its entirety;

_____ REJECTED in its entirety;

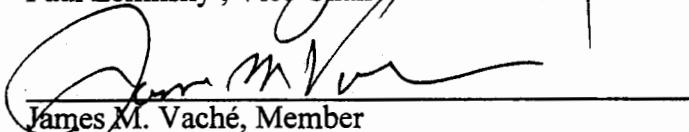
X _____ MODIFIED. This Stipulation will become the Order of the Board if the Respondent approves* the following modification(s):

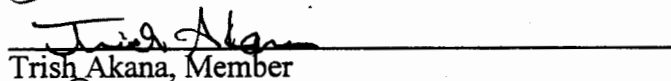
\$500 civil penalty - to suspended

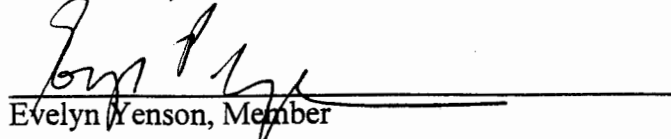
DATED this 10th day of September, 2004

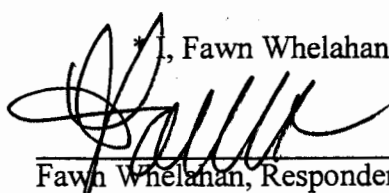

Marilee Scarbrough, Chair


Paul Zellinsky, Vice Chair


James M. Vaché, Member


Trish Akana, Member


Evelyn Jensen, Member

*, Fawn Whelahan (accept/do not accept (circle one) the proposed modification(s).
Fawn Whelahan, Respondent 11-22-04 Date